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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EVERFLOW TECHNOLOGY
CORPORATION, incorporated under
the laws of the Republic of China
(Taiwan),

Plaintiff,

vs.

MILLENNIUM ELECTRONICS,
INC., a California corporation,

Defendant.

Case No.: C07-05795-JF (HRL)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR ORDER QUASHING SUBPOENA OR,
IN THE ALTERNATIVE, A PROTECTIVE
ORDER AND FOR EXPENSES OF
MOTION**

Date: September 23, 2008

Time: 10:00 a.m.

Magistrate: Howard R. Lloyd

I. FACTUAL BACKGROUND

Plaintiff Everflow Technology Corporation's (hereinafter "EVERFLOW") Complaint of record in this matter alleges breach of contract and common counts against Defendant MILLENNIUM ELECTRONICS, INC. (hereinafter "MILLENNIUM"). (Declaration of Kevin Martin "Martin Decl." ¶ 2) EVERFLOW alleges MILLENNIUM has failed to pay over \$2 million dollars for fans and other related equipment that EVERFLOW allegedly delivered to MILLENNIUM from January of 2007 through October of 2007. (*Id.* at ¶ 3)

On July 31, 2008, EVERFLOW served subpoenas for documents on County Bank, Inc.

(hereinafter “COUNTY”) for all records, relating to accounts held by Jamel Enterprises, LLC (hereinafter “JAMEL”), Millennium International (hereinafter “MI”), and Loroco Sales, Inc. (hereinafter “LOROCO”), James Loro, Melva Loro and Nadine Loro (“MOVING PARTIES”) including savings, checking, credit line, certificates of deposit, loans and credit cards, account statements, records of wire transfers, signature cards, powers of attorney, loan applications, credit card applications and records relating to letters of credit (collectively referred to herein as “Bank Records”). (*See* Martin Decl. ¶ 4; Martin Decl. Exh. A)

II. ARGUMENT

A. GOOD CAUSE EXISTS TO CONSIDER MOVING PARTIES’ OBJECTIONS TO THE SUBPOENA BECAUSE THE MOVING PARTIES DID NOT RECEIVE NOTICE OF THE SUBPOENA UNTIL AFTER A RESPONSE WAS DUE

In unusual circumstances and for good cause, the failure to act timely will not bar consideration of objections to a Rule 45 subpoena. *See McCoy v. Southwest Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D.Cal., 2002). The court may consider untimely objections to an subpoena duces tecum when the subpoena is overbroad on its face and exceeds the bounds of fair discovery. *McCoy*, 211 F.R.D. at 385; *See also* Federal Rule of Civil Procedure (“FRCP”) 45..

Here, JAMEL, James Loro, Melva Loro, and Nadine Loro (collectively the “MOVING PARTIES”) did not receive notice of the subpoenas to COUNTY prior to EVERFLOW’S service of the subpoena, or anytime before the required date for COUNTY’S production of the Bank Records. *See* FRCP 45(b)(1). Thus, the MOVING PARTIES were not provided with adequate notice to allow them to object or bring a motion to quash the subpoenas for Bank Records which contain confidential financial information protected by their right to privacy. As soon as the MOVING PARTIES received notice of the subpoenas, they immediately filed this motion.

Additionally, the subpoena is overbroad in that it includes documents that may be protected by the privacy rights of the MOVING PARTIES in their confidential financial information. Furthermore, the subpoena does not seek relevant information “within the bounds of fair discovery” because the Bank Records requested for JAMEL, MI, or LOROCO do not

1 belong to a party to this action. McCoy, 211 F.R.D. at 385. Moreover, the subpoena is
 2 overbroad in that it does not specify a date range for the documents requested. Therefore, the
 3 scope of documents responsive to the subpoena is limitless with regard to dates and far exceeds
 4 the reasonable bounds of fair discovery.

5 Based on the foregoing reasons, good cause exists to consider the objections of the
 6 MOVING PARTIES to the subpoena served by EVERFLOW on COUNTY for their Bank
 7 Records.

8 **B. THE COURT SHOULD QUASH THE SUBPOENA BECAUSE EVERFLOW'S**
 9 **INTERESTS IN OBTAINING THE DOCUMENTS ARE FAR OUTWEIGHED BY**
 10 **THE MOVING PARTIES' PRIVACY RIGHTS**

11 Federal Rule of Civil Procedure 45(c)(3)(B)(i) provides that the court may grant a motion
 12 to quash a subpoena if it requires a party to disclose trade secret or other confidential research,
 13 development, or commercial information. In a federal action based on diversity jurisdiction,
 14 state law governs privilege claims. McCoy, at 386; *See also* Fed.R.Evid. 501; *citing* Star
 15 Editorial, Inc. v. United States District Court for the Central District of California (Dangerfield),
 16 7 F.3d 856, 859 (9th Cir.1993); *also citing* Oakes v. Halvorsen Marine Ltd., 179 F.R.D. 281, 284
 17 (C.D.Cal.1998). However, the analysis involved in application of the federal discovery abuse
 18 protections overlaps to a degree with the privacy privilege balancing under California law,
 19 although California privacy protections are somewhat stronger, and may apply despite mere
 20 discovery relevance. Davis v. Leal, 43 F.Supp.2d 1102, 1110 (E.D.Cal.,1999); Cal. Const. Art.
 21 1, § 1; FRCP 26(b)(1); 28 U.S.C.A.

22 The burden to demonstrate the validity, or conversely, the invalidity of the privacy
 23 privilege under California law is hybrid: where there is no doubt that the information requested
 24 implicates traditional notions of what is private information, the burden is on the requesting party
 25 to demonstrate that the information is directly relevant to the case, and that the information needs
 26 of the case outweigh the need for non-disclosure. Davis, at 1110. The concept of privacy under
 27 the California Constitution is extended to financial privacy in litigation. Id.; Cal. Const. Art. 1, §
 28 1. The court utilizes the term “financial privacy” broadly and encompasses within that term not

1 only bank records, but also documents generated in one's business affairs, e.g., contracts,
 2 business records and the like that have not received widespread dissemination, or have not been
 3 publicly filed. *Id.* at 1111.

4 Here, the Bank Records requested by EVERFLOW contain confidential financial and tax
 5 information belonging to the LOROS individually. The LOROS submitted their tax returns, and
 6 other financial evidence as their individual security for some of the loans that JAMEL, MI and
 7 LOROCO applied for at COUNTY. In addition to the individual privacy rights of the LOROS in
 8 their financial information, the Bank Records of JAMEL, MI, and LOROCO have not been
 9 widely disseminated and disclosure of such business affairs would intrude upon the privacy
 10 rights of the businesses.

11 These records are clearly covered by the privacy privilege under California law and
 12 therefore, EVERFLOW bears the burden of demonstrating that the information is directly
 13 relevant to the case and that the information needs of the case outweigh the need for non-
 14 disclosure. EVERFLOW has not pled any facts in its Complaint to support its request for
 15 confidential Bank Records of an unrelated third-party. Moreover, there are certainly less
 16 invasive means for EVERFLOW to discover what, if any, connection there is between
 17 MILLENNIUM and JAMEL, MI, and/or LOROCO. Thus, a balancing test of the interests of
 18 EVERFLOW, if any, in obtaining the Bank Records is far outweighed by the privacy interests of
 19 the MOVING PARTIES.

20 **C. THE SUBPOENA REQUESTS DOCUMENTS THAT ARE IRRELEVANT TO**
 21 **THE CLAIMS OR DEFENSES OF THE PARTIES**

22 Although irrelevance is not among the enumerated reasons for quashing a subpoena
 23 under Rule 45(c)(3), federal courts have incorporated relevance as a factor to be considered
 24 when ruling on motions to quash. *Moon*, 232 F.R.D. at 637; *See also Goodyear Tire & Rubber*
 25 *Co. v. Kirk's Tire & Auto Servicenter*, 211 F.R.D. 658, 662 (D.Kan. 2003); *Travelers*, 228
 26 F.R.D. at 113; *United States v. IBM*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979).

27 As discussed above, EVERFLOW'S complaint includes causes of action for breach of
 28

1 contract and common counts arising out of MILLENNIUM'S alleged failure to pay for goods
 2 received. Neither JAMEL, MI, nor LOROCO entered into any contracts with EVERFLOW, and
 3 are not named as parties in this action. Moreover, neither JAMEL, MI, nor LOROCO are
 4 obligated to compensate EVERFLOW for any of the contract damages it allegedly incurred.
 5 EVERFLOW seeks to recover damages from MILLENNIUM, which bears no correlation to the
 6 Bank Records of JAMEL, MI, or LOROCO. Any financial information regarding
 7 MILLENNIUM, if relevant in this matter, should be obtained directly from MILLENNIUM.
 8 Therefore, the Bank Records of JAMEL, MI, and LOROCO are irrelevant and unnecessary to
 9 prove or defend the claims in EVERFLOW'S Complaint and the subpoena should be quashed.

10 EVERFLOW'S subpoena is an arbitrary fishing expedition and places an undue burden
 11 on JAMEL, MI, and LOROCO to disclose confidential Bank Records without any enumerated
 12 purpose. As such, the MOVING PARTIES' motion to quash EVERFLOW'S subpoena should
 13 be granted.

14 **D. IF THE MOTION TO QUASH IS DENIED, THE COURT SHOULD GRANT A**
 15 **PROTECTIVE ORDER LIMITING THE DOCUMENTS AND INFORMATION**
DISCOVERABLE BY EVERFLOW

16 Under California law, even where the balance weighs in favor of disclosure of private
 17 information, the scope of disclosure will be narrowly circumscribed; such an invasion of the
 18 right to privacy must be drawn with narrow specificity and is permitted only to the extent
 19 necessary for a fair resolution of the lawsuit. Davis, at 1110; Cal. Const. Art. 1, § 1.

20 Here, the documents subpoenaed by EVERFLOW contain confidential financial
 21 documents and information for the LOROS, such as tax returns, social security numbers, income
 22 statements, and disclosures of assets. In the interests of fairness, if the court denies the motion to
 23 quash the subpoena, the court should issue a protective order that would narrow the scope of
 24 disclosure to limit any invasion of the MOVING PARTIES' rights to privacy.

25 **E. THE COURT SHOULD ORDER EVERFLOW TO PAY MOVING PARTIES THE**
 26 **REASONABLE COSTS OF BRINGING THIS MOTION**

27 A party or attorney responsible for issuing and serving a subpoena must take reasonable

1 steps to avoid imposing an undue burden on a person subject to the subpoena. Additionally, the
2 issuing court must enforce this duty and impose appropriate sanctions, such as reasonable
3 attorney's fees, on a party or attorney who fails to comply. FRCP 45(c)(1). Moreover, if the
4 court decides that the attorney or party who propounded the discovery acted without substantial
5 justification for the request, the court may impose sanctions. California Code of Civil Procedure
6 ¶ 2017.020.

7 For the reasons discussed above, EVERFLOW'S subpoena lacks substantial justification
8 and places an undue burden on the MOVING PARTIES. As such, EVERFLOW should be
9 ordered to pay the MOVING PARTIES \$1,669.50, which is the reasonable cost of bringing this
10 motion. (*See* Martin Decl. ¶ 5)

11 III. CONCLUSION

12 Based on the foregoing reasons, the MOVING PARTIES request this Court to quash
13 EVERFLOW'S subpoena to COUNTY for the Bank Records of JAMEL, MI, and LOROCO, or
14 in the alternative, grant a protective order limiting the scope of disclosure to the extent necessary
15 to limit any invasion of MOVING PARTIES' privacy rights..

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17 Respectfully Submitted,

18 Date: August 15, 2008

RANDICK O'DEA & TOOLIATOS, LLP

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20 By: /s/
Kevin R. Martin